Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1712

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOES 1-4, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal grand jury subpoena may be quashed on the ground that the depositions sought are protected by a Rule 26(c) civil protective order.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-25a) is reported at 836 F.2d 1468. The opinion of the United States District Court for the District of Maryland (Pet. App. 26a-38a) is reported at 659 F. Supp. 628.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1988. A petition for rehearing was denied on March 18, 1988 (Pet. App. 39a). The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 16, 1986, and again on January 21, 1987, a special grand jury investigating the collapse of a Maryland

savings and loan institution issued subpoenas compelling production of depositions given by petitioners in a civil action in the Eastern District of Virginia. Petitioners moved the United States District Court for the District of Maryland to quash the grand jury subpoenas on the ground that their depositions were sealed by a protective order entered in the civil action in Virginia. The motion to quash was denied; the Fourth Circuit affirmed. Pet. App. 1a, 3a. Petitioners now seek review in this Court.

1. Petitioners are former officers and directors of Community Savings & Loan (Community) and its related financial entities, known as the EPIC group. In 1985, Community suffered a financial collapse. Shortly thereafter, civil suits were instituted against EPIC and consolidated in the Eastern District of Virginia. *In re: EPIC Mortgage Insurance Litigation,* M.D.L. No. 680 (E.D. Va.). Plaintiffs in that litigation sought third-party depositions from petitioners (Pet. App. 2a). Petitioners, who knew that a federal grand jury in Maryland was investigating Community and EPIC (*ibid.*), requested a stay of discovery in the civil action, on the ground that their testimony might tend to incriminate them. The district court in Virginia denied the stay, but proposed that a protective order "would satisfy their concerns with the fifth amendment privilege" (*id.* at 9a n.7). In an order negotiated by the parties, the district court in Virginia prohibited disclosure to "any state or federal investigating agency or authority" (*id.* at 3a). No notice of the protective order was given to the government or the United States Attorney conducting the grand jury investigation (*id.* at 17a-18a).

After the depositions were taken, the Maryland grand jury issued subpoenas duces tecum commanding petitioners' attorney to appear and produce transcripts of the depositions in his custody. Petitioners moved to quash, urging that the government was not entitled to the depositions in the absence of a modification of the protective order. At the

request of the Maryland district court, the government sought clarification of the protective order; the Virginia district court confirmed its intention to preclude access to "the grand jury as well as any other investigative person or body of the state or federal government" (Pet. App. 3a-4a, 27a-38a n.3). The government then returned to the Maryland district court, requesting a ruling on petitioners' motion to quash.

2. The Maryland district court denied the motion, distinguishing cases involving an informal government request for materials covered by a protective order (Pet. App. 32a). The court concluded that the grand jury's broad powers to subpoena materials, and its rights to "every man's evidence" cannot be overcome simply because protective orders further "the need for witnesses and parties to be more cooperative in civil litigation" (*id.* at 30a, 34a).

3. A divided panel of the court of appeals affirmed. After emphasizing the "sweeping power of the grand jury to compel [testimony]" (Pet. App. 5a, citing *Blair* v. *United States,* 250 U.S. 273, 280 (1919)), the court rejected petitioners' contention that their reliance upon the protective order justified quashing the grand jury subpoena. The Fourth Circuit concluded that Rule 26(c), Fed. R. Civ. P., was not intended as a surrogate for either the Fifth Amendment or statutory immunity. When faced with the deposition notice, petitioners were entitled to invoke their Fifth Amendment privilege against self-incrimination or seek immunity from the federal prosecutor. They could not attempt to obtain the benefits of these protections by means of the Federal Rules of Civil Procedure (Pet. App. 6a):

> [T]he deponents' fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of civil protective orders. Deponents were entitled to rely only on their own silence or a grant of immunity to protect their rights, otherwise they risked waiving those rights.

The court of appeals recognized that this might impose a difficult choice upon parties subject to deposition in civil litigation, but noted that petitioners were not parties to the civil litigation and, in any event, any adverse *civil* consequence attaching to their testimony was not within the protection afforded by the Fifth Amendment against compelled self-*incrimination* (*id.* at 7a-8a).

In concluding that the protective order did not provide sufficient grounds to quash the grand jury subpoena, the court also rejected petitioners' argument that the Second Circuit's decisions suggested a different result. Observing that "no court of appeals has directly addressed the issue in this case" (Pet. App. 10a), the court concluded that two Second Circuit cases involving the government's compulsory process supported its holding (*id.* at 10a-11a). See *United States* v. *GAF Corp.*, 596 F.2d 10 (1979) (court enforces federal statutory subpoena)[1] and *United States* v. *Davis*, 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983) (court enforces grand jury subpoena).[2]

ARGUMENT

The decision below is correct and does not conflict with any decisions of this Court or any other court of appeals.

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[1] The court also noted (Pet. App. 12a) that *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985), although distinguishable from the instant case and "difficult to reconcile with" *GAF Corporation*, would appear to "militate in favor of upholding the protective order here."

[2] Judge Sprouse dissented, observing that the majority's holding would "retard[ ] effective and informative discovery," by undermining the vitality of the Rule 26 protective order (Pet. App. 21a). While concurring in the majority's Fifth Amendment analysis, and stating that the deponents had "waived fifth amendment rights" (*id.* at 21a), Judge Sprouse concluded that the government should not be permitted "evidence it would not have obtained but for overriding a protective order" (*id.* at 22a).

Accordingly, no further review is warranted.

1. Petitioners' argument is based on the claim that they are entitled to rely upon Rule 26(c), Fed. R. Civ. P., to protect themselves against self-incrimination. The Fourth Circuit, however, was clearly correct in rejecting this claim. The privilege against self-incrimination is grounded in the Fifth Amendment to the Constitution, not in the Federal Rules of Civil Procedure. If petitioners believed that their testimony as third-party deponents might incriminate them, they were free to invoke the Fifth Amendment. *Pillsbury Co.* v. *Conboy,* 459 U.S. 248 (1983). Because they failed to assert the privilege with respect to that testimony, they have lost it. *United States* v. *Kordel,* 397 U.S. 1 (1970) (witness who failed to assert privilege with respect to interrogatories could not then claim that the government was barred from using them in a parallel criminal proceeding); see also *Garner* v. *United States,* 424 U.S. 648 (1976) (incriminating disclosures made without claiming privilege on compelled tax returns may be used in criminal prosecution over defendant's Fifth Amendment objection).

The Fourth Circuit recognized the potential hardship in requiring a deponent in a civil action to choose between waiving his privilege or refusing to testify in reliance on it, but correctly concluded that the Fifth Amendment does not protect against the need to make such hard choices. Cf. *McGautha* v. *California,* 402 U.S. 183, 215-216 (1971). Indeed, the Fifth Amendment was intended to prevent compelled self-incrimination, not every potentially adverse consequence that might arise in a civil action because a witness asserted the privilege. See *Lefkowitz* v. *Cunningham,* 431 U.S. 801, 808 n.5 (1977). As this Court has stated, "the prevailing rule" is that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify * * *: the Amendment 'does not preclude the inference where the privilege is claimed by a

party to a civil cause.' " *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976) (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961) (emphasis in original)). Thus, "at trial a civil defendant's silence may be used against him, even if that silence is an exercise of his constitutional privilege against self-incrimination." *National Acceptance Co.* v. *Bathalter*, 705 F.2d 924, 929 (7th Cir. 1983).

The Fourth Circuit also correctly recognized that petitioners' claims of hardship were in fact exaggerated. Petitioners were third-party deponents in the civil action, and hence were not faced with the risks that litigating parties face when they choose not to testify. More importantly, petitioners must have been aware of the risk that the government would be able to obtain the depositions. Petitioners' own proposed standard for modifying a protective order leaves open the possibility that the government will obtain protected materials upon a showing of "compelling need" or "extraordinary circumstances" (Pet. 12). Under this standard, a potential witness concerned about self-incrimination cannot rely upon the protective order as an absolute protection against disclosure of the information. A compelling interest standard would in fact present sufficient uncertainty that an accused "would be reluctant, and perhaps foolish, to submit to discovery." Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 Harv. L. Rev. 1023, 1038 (1985).[3]

[3] See also Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1104 (1981) (labelling as "surely fallacious" petitioners' argument that a deponent will not invoke his privilege if a deposition is covered by Rule 26(c)); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018 at 153 (1970) ("It has been suggested that a protective order impounding the results of the discovery and forbidding disclosure to anyone other than the parties would remove the risk of incrimination, but whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful.").

What petitioners really seek through the device of a protective order is Fifth Amendment protection without the need actually to invoke the Fifth Amendment. They seek a right not to testify before the grand jury but nevertheless to retain the ability to testify in the civil action. The Fourth Circuit correctly recognized that this course of conduct is foreclosed by this Court's established Fifth Amendment jurisprudence. The Fifth Amendment may be invoked in civil actions. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977). But even a mistaken failure to assert the privilege may still operate to waive it. See, *e.g.*, *Garner* v. *United States*, 424 U.S. at 654 n.9 (observing that *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), "[makes] clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver"). Accordingly, this Court has held that information obtained by the government in a civil proceeding may be used in obtaining a criminal conviction. *United States* v. *Kordel*, 397 U.S. 1 (1970).

There is nothing, then, in the Fourth Circuit's decision that undermines petitioners' constitutionally protected interests. On the other hand, accepting petitioners' analysis would raise serious separation of powers issues. In petitioners' view, a protective order would amount to a grant of immunity for testimony given in the civil action. But as this Court stated in *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983): "No court has authority to immunize a witness. That responsibility * * * is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." See 18 U.S.C. 6002 *et seq.* Concerned about this problem, the Fourth Circuit wisely refused to "authoriz[e] district courts to give civil deponents *de facto* grants of immunity in the guise of Rule 26 protective orders" (Pet. App. 14a).[4]

[4] Adoption of petitioners' preferred standard – "compelling need" – would also raise serious questions about the propriety of the civil trial

Contrary to petitioners' implication (Pet. 12), the Fourth Circuit's holding does not threaten to impede civil litigation. As the Fourth Circuit noted, there are a number of ways a trial court may manage litigation so as not to deprive civil litigants of their day in court because witnesses have chosen to rely upon the Fifth Amendment. These judicial management tools include the use of stays to delay discovery, pretrial hearings to assess the validity of the claimed privilege, and traditional rules of burden-shifting and evidence (Pet. App. 15a-16a). The interests of civil litigants in seeing their cases progress will not be significantly undermined by the Fourth Circuit's decision here.

Nor will the decision in this case interfere with the salutary effects of Rule 26(c) protective orders. Such orders will remain available to facilitate litigation by affording parties protection against disclosure to the public, or to competitors, or for any other reason listed in Rule 26(c). After this decision, as before, a court may enter a protective order whenever "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

On the other hand, if petitioners' position were accepted, the power of the grand jury would be seriously undermined. Denying enforcement of a grand jury subpoena strikes at the heart of the grand jury's right to all relevant evidence. *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Such a ruling not

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court's intervention in a criminal grand jury investigation. A court inquiring as to the "need" of the grand jury for evidence threatens to impinge on the grand jury's right to determine what is relevant and necessary to its investigation. See *Blair* v. *United States*, 250 U.S. 273 (1919). If the grand jury is "even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973).

only denies the grand jury access to information that may be critical to the investigation of substantive offenses, but also to testimony that may be the essence of a crime in itself—perjury. If a protective order shields deposition testimony from a grand jury subpoena, witnesses may be able with impunity to provide testimony in the civil action in direct conflict with the testimony subsequently given to the grand jury. Moreover, the grand jury must have the right to obtain evidence that it believes may be relevant to the government's charges. It has that right because it stands as the public's representative, as an intermediary " 'between the accuser and the accused.' " *Branzburg* v. *Hayes,* 408 U.S. at 687 n.23 (quoting *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962)). Because the grand jury serves that important function, the public suffers when the grand jury is deprived of relevant evidence.

2. Petitioners contend that review is warranted because the decision below conflicts with Second Circuit decisions. Contrary to petitioners' implication, the Fourth Circuit did not hold here that a governmental entity, in all circumstances and by any means whatsoever, is entitled to information protected by a Rule 26(c) order; it decided only that a particular kind of process—a federal grand jury subpoena—is enforceable despite the existence of a civil protective order.

As the Fourth Circuit noted (Pet. App. 10a), the Second Circuit has never addressed that precise issue. The Second Circuit has been presented in a series of cases with differing kinds of attempts by the government to obtain materials governed by a civil protective order: an informal request by telephone and letter (*Martindell* v. *ITT,* 594 F.2d 291 (1979)); a request by motion to vacate a protective order (*Palmieri* v. *New York,* 779 F.2d 861 (1985); *Minpeco S.A.* v. *Conticommodity Services, Inc.,* 832 F.2d 739 (1987)); and a statutory civil investigative demand (*United States* v.

GAF Corp., 596 F.2d 10 (1979)). Petitioners' argument that the Second Circuit has undeviatingly followed a "compelling need" standard (Pet. 9), in asserted conflict with the ruling here (*id.* at 10), ignores the Second Circuit's careful practice of deciding these cases on their particular facts, and in particular the weight it has given to the nature of the government's demand.

In cases where the government seeks enforcement of a formal demand for materials protected by a Rule 26(c) order, as in this case, the Second Circuit's decisions are in accord with the Fourth Circuit's here: the government's compulsory process is enforced without a showing of "compelling need." In *United States* v. *GAF Corp., supra,* for example, the court enforced a federal civil investigative demand (CID)[5] issued by the Antitrust Division of the Department of Justice. Earlier, the government had sought to obtain the same materials by moving to modify a protective order. The motion was denied because the government's interest in the "possible" use of the information in a criminal investigation was " 'not clearly specified or specifiable in advance.' " *Id.* at 12 (quoting *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129, 130, 133 (S.D.N.Y. 1976)). The Antitrust Division then decided to obtain the same materials by means of a CID, and petitioned for enforcement in the district court. *United States* v. *GAF Corp.*, 449 F. Supp. 351 (S.D.N.Y. 1978), rev'd, 596 F.2d 10 (2d Cir. 1979). On appeal, the Second Circuit rejected Kodak's argument that the protective order prevented enforcement of the government's formal process. Nowhere did the court indicate that the government's enforcement power was contingent upon the showing of a "compelling need" for the materials.

Petitioners thus err in contending that the Second Circuit has adopted a monolithic "compelling need" standard.

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[5] A CID is a statutorily authorized subpoena (15 U.S.C. 1312).

GAF proves the contrary; indeed, the differing results achieved by the government in the same case depending upon how it sought to obtain the protected materials is dramatic evidence that petitioners have failed to take into account a critical distinction essential to the Second Circuit's analysis.[6] Where the government has sought to enforce a formally authorized subpoena, as in *GAF* and here, the Second Circuit has not inquired about the government's "need" for the materials. Only where an informal demand is made—as, for example, by a motion to vacate a protective order—does the Second Circuit require that a compelling need be demonstrated. See *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985).[7]

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[6] Petitioners do not refer to *GAF*, a case upon which the court of appeals substantially relied (Pet. App. 10a-12a).

[7] The issue in *Palmieri*, upon which petitioners chiefly rely for their conflict claim, arose when the State of New York conducted an antitrust investigation and, in furtherance of its efforts, sought to obtain the terms of a settlement agreement that was subject to a protective order entered in a private federal civil action. Although a state grand jury had been impaneled for some time, the State Attorney General did not attempt to obtain the settlement agreement by using compulsory process; instead, the State filed a motion to lift the protective order. The district court granted the State's motion, and the Second Circuit reversed, concluding that the district court had erred in failing to find either a "compelling need" to modify the order or that the order was "improvidently granted" in the first instance. 779 F.2d at 865-866.

Essential to both the holding and analysis of *Palmieri* is the method by which the State chose to obtain the protected materials. In concluding that a compelling need was necessary to modify a protective order, the Second Circuit relied heavily on the existence of alternate means available to satisfy the State's desire for information. Noting the broad reach of the State's investigative powers, the Second Circuit stated (779 F.2d at 866 (citations omitted)):

> [T]he state has a special burden with respect to the materials that it seeks to unseal. * * * "[T]he federal government * * * ha[s] at its disposal special investigatory powers, not available

Thus, in *Martindell* v. *ITT,* 594 F.2d 291 (2d Cir. 1979), the government had attempted to obtain protected materials by requests over the telephone and by letter to the judge who had granted the protective order. The district court declined to modify the protective order, and the Second Circuit affirmed, emphasizing the informal nature of the request: "The Government may not * * * simply by picking up the telephone or writing a letter to the court * * * insinuate itself into a private lawsuit between others" (*id.* at 294).[8]

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to private litigants * * *." We note that the State of New York enjoys a similar privileged position with respect to its investigatory powers. For example, it has the power to subpoena persons and documents before the grand jury * * *.

By emphasizing the alternate means available, the court implicitly distinguished between cases in which the government moves to modify a protective order and cases in which the government issues, and seeks enforcement of, compulsory grand jury process. To the *Palmieri* court, it was not simply a matter of form whether the State proceeded indirectly by means of a motion to modify or directly by a grand jury subpoena: the method was a measure of the degree of the government's interest. The Second Circuit was reluctant to permit interference in civil litigation based solely upon the State's representation in its moving papers that it needed the materials for its grand jury investigation when the grand jury itself had failed to express its interest directly through a subpoena. *Id.* at 865-866.

Since *Palmieri,* the Second Circuit has confirmed that should the government express its interest in protected materials by means of a motion to modify a protective order, it will be held to a compelling need standard. *Minpeco S.A.* v. *Conticommodity Services, Inc.,* 832 F.2d 739 (1987); *H.L. Hayden Co.* v. *Siemens Medical Systems,* 797 F.2d 85 (1986). Petitioners claim that *Minpeco* and *Palmieri* involved "formal" means, unlike the same court's decision in *Martindell* (Pet. 10 n.2). But neither *Minpeco* nor *Palmieri* involved a grand jury subpoena as is the case here. See *United States* v. *Davis,* 702 F.2d 418, 422 (2d Cir.) (distinguishing between proceeding by motion to modify and use of grand jury process), cert. denied, 463 U.S. 1215 (1983).

[8] The *Martindell* court specifically noted that the government had discharged the grand jury investigating the matter and "apparently

Subsequently, in *United States* v. *Davis,* 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983), the Second Circuit was faced with a case involving formal grand jury process. Grand jury subpoenas had been issued for deposition testimony given in a prior civil action in Bankruptcy Court. A claim was made that the deposition was protected from disclosure by a confidentiality agreement. Ultimately, the Second Circuit rejected that argument because the deposition was protected only by a tentative understanding, not by a Rule 26(c) protective order. In analyzing the issue, however, the Second Circuit expressly declined to apply the *Martindell* standard, because the informal demand in that case was an attempt by the government to proceed "outside of its usual investigative powers to secure the requested testimony, not by grand jury subpoena" (702 F.2d at 422).

In sum, the Fourth Circuit's decision here comports with this Court's decisions and is not in conflict with the decisions of the Second Circuit or with the decisions of any other court of appeals. In the absence of such a conflict, there is no need for further review.

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chose not to use grand jury investigative processes to obtain the[ ] testimony" (594 F.2d at 296 n.5). The Second Circuit went on to distinguish the issue presented here: "[W]e are not called upon in the present case to decide whether the Government might be entitled to enforcement of a subpoena compelling production of the depositions" (*id.* at 296 n.6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-013/60501